UPREME COURT, U. S.

FILED
DEC 18
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1968
No. 443

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner

v.

BESSEMER AND LAKE ERIE RAILROAD COMPANY,
THE PENNSYLVANIA RAILROAD COMPANY,
LEHIGH VALLEY RAILROAD COMPANY,
THE NEW YORK CENTRAL RAILROAD COMPANY,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
THE DELAWARE AND HUDSON RAILROAD CORPORATION,
READING COMPANY,
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
WESTERN MARYLAND RAILROAD COMPANY,
ERIE LACKAWANNA RAILROAD COMPANY,
MONTOUR RAILROAD COMPANY,
THE MONONGAHELA RAILROAD COMPANY,
PITTSBURGH, CHARTIERS & YOUGHIOGHENY RAILWAY COMPANY,
Respondents

PETITION OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION FOR REHEARING AND RECONSIDERATION OF ORDER OF DECEMBER 2, 1968, DENYING PETITION FOR CERTIORARI UNDER RULE 58

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 443

Pennsylvania Public Utility Commission,
Petitioner

v.

Bessemer and Lake Erie Railroad Company,
The Pennsylvania Railroad Company,
Lehigh Valley Railroad Company,
The New York Central Railroad Company,
The Baltimore and Ohio Railroad Company,
The Delaware and Hudson Railroad Corporation,
Reading Company,
The Central Railroad Company of New Jersey,
The Pittsburgh and Lake Erie Railroad Company,
Western Maryland Railway Company,
Erie Lackawanna Railroad Company,
Montour Railroad Company,
The Monongahela Railroad Company,
Pittsburgh, Chartiers & Youghiogheny Railway Company,
Respondents

PETITION OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION FOR REHEARING AND RECONSIDERATION OF ORDER OF DECEMBER 3, 1968, DENYING PETITION FOR CERTIORARI UNDER RULE 58

To the Honorable the Justices of the Said Court:

The Petition of the Pennsylvania Public Utility Commission respectfully represents:

1. That on December 3, 1968 Your Honorable Court denied our Petition for Certiorari to the Supreme Court of Pennsylvania;

2. That in the hope that Your Honorable Court may review the Petition once again and find that Certiorari should be granted, as has been known to happen in the past, this Commission respectfully files this Petition for Reconsideration;

3. That Your Honorable Court has promised in many cases that:

> "If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here."
>
> *Martin v. Creasey,* 360 U.S. 219, 225, 79 S. Ct. 1034, 3 L. Ed. 2d 1186 (1959).

"Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right."

Public Service Commission of Utah v. Wycoff Company, Inc., 344 U.S. 237, 248, 73 S. Ct. 236, 97 L. Ed. 291 (1952).

"If the decision of that court shall deny to Georgia any rights secured to it by the Constitution and laws of the United States, the case may be brought here for reexamination and review."

Georgia v. Chattanooga, 264 U.S. 472, 484, 44 S. Ct. 369, 68 L. Ed. 796 (1923).

"On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here."

Burford v. Sun Oil Co., 319 U.S. 315, 334, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943).

"Since it was open for Bullington to come here to seek reversal of the decision of the North Carolina Supreme Court . . . He forewent his right to have a higher court, this Court, enable him to win his chance by holding that he was right and that the North Carolina Supreme Court was wrong."

Angel v. Bullington, 330 U.S. 183, 189, 190, 67 S. Ct. 657, 91 L. Ed. 832 (1947).

4. That a failure to review the decision of the Supreme Court of Pennsylvania in this case is tanta-

mount to a declaration that that decision is correct and that the States no longer have any right to regulate flagging within their borders;

5. That such a holding invalidates the laws of a half dozen or more States which have regulated flagging for scores of years;

6. That the issue is not so clear or certain that these States through the means of this case should be deprived of a hearing in their defense;

7. That the decision of the Supreme Court of Pennsylvania does create a no-man's land where in the very vital field of safety since States are precluded from providing for flagging in areas on the railroad tracks where no block signal system is operative, and where, admittedly, the I.C.C. under Section 25 would have no authority to act;

8. That for the reason alone that the decision of the Pennsylvania Supreme Court decision is too broad, review should be had to spell out the rights of the States with regard to flagging vis-a-vis the federal government;

9. *That respectable opinion exists,* as evidenced by the fact that the decision of the Supreme Court of Pennsylvania in this case was a bare 4-3 majority, that the decision of the Superior Court of Pennsylvania was 7-0 in favor of the P.U.C.'s position, that the Supreme Court of New Jersey ruled in favor of the P.U.C.'s position, that a great number of learned jurists are also of the same opinion, *that Section 25 of the Interstate Commerce Act does not preempt State action* in the field of flagging;

10. That this is an important and significant case and one in which the States are entitled to be heard before their reserved powers in this important area are buried forever;

11. That the law reviews of the Dickinson Law School and the Utah University School of Law are preparing law review articles which should be printed within the next several weeks which thoroughly discuss this case and, upon information and belief, counsel avers that these articles conclude that the decision of the Pennsylvania Supreme Court is erroneous.

Wherefore, your petitioner prays Your Honorable Court, after reading this Petition and the Petition for Certiorari, to grant this Petition for Reconsideration and grant the Petition for a Writ of Certiorari,

And it will ever pray, etc.

Respectfully submitted,
WILLIAM A. GOICHMAN
Assistant Counsel
EDWARD MUNCE
Acting Counsel
For Pennsylvania Public Utility Commission

CERTIFICATE

The undersigned, a member of the Bar of the Court, certifies that this Petition of the Pennsylvania Public Utility Commission for Rehearing and Reconsideration of Order of December 3, 1968, Denying Petition for Certiorari under Rule 58 is presented in good faith and not for the purpose of delay.

WILLIAM A. GOICHMAN
Assistant Counsel